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SITI DZAHIRAH HARUN v. MAYBANK BANKING BHD & ANOR

COURT OF APPEAL, PUTRAJAYA
MOHAMAD ZABIDIN MOHD DIAH JCA
S NANTHA BALAN JCA
B DARRYL GOON SIEW CHYE JCA
[CIVIL APPEAL NO: W-01(A)-354-07-2019]
28 JANUARY 2022

C **Abstract** – *Banks are highly regulated for obvious and incontrovertible reasons but, within the core for the need to regulate such financial institutions, is the indispensable necessity for uncompromising integrity. Consonant with this essential ingredient of integrity is a requirement, not only for integrity in the system in which financial institutions operate, but also in the personnel who man the system, namely the employees. Vested with responsibilities and duties, an employee is in a position within the financial industry that could not afford to brook any shortcoming in integrity.*

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E ***CIVIL PROCEDURE:*** *Judicial review – Industrial Court – Judicial review against Industrial Court's award – Bank's employee dismissed following charges of misconduct – Employee engaged in private business without bank's consent – Matter referred to Industrial Court – Industrial Court dismissed employee's claim – Employee's application for judicial review of Industrial Court's award dismissed by High Court – Whether judicial review proceedings mere challenge to findings of fact and conclusions made by Industrial Court – Whether findings reviewable by way of judicial review proceedings – Whether judicial review proceedings initiated by employee essentially appeal in disguise*

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G The appellant was the Senior Relationship, Head Recruitment Operations and Strategic Account Director, Career Transaction Centre of the first respondent, Malayan Banking Bhd ('bank'). When she joined the bank, the appellant was the majority shareholder and a director of RSA Solutions Sdn Bhd ('RSA'), a photocopying and photo-studio business. RSA had leased photocopying equipment from Fuji Xerox Asia Pacific Pte Ltd ('Fuji Xerox') and both parties entered into a rental agreement, where the appellant acted as one of the guarantors. When RSA defaulted in making payments, Fuji Xerox commenced a civil suit for the recovery of the sum of RM160,485.77 and the appellant was named as one of the defendants. A judgment in default ('JID') was entered against, *inter alia*, the appellant, where the appellant agreed to settle a lesser sum of RM120,000 by way of monthly instalments of RM2,000 to Fuji Xerox. The appellant later negotiated with Fuji Xerox and made a plea for indulgence for the judgment debt to be reduced to RM70,000 and to be allowed to settle the amount by way of monthly

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instalments of RM1,000 each. Upon the discovery by the bank of the appellant's association with RSA, the latter was charged for misconduct for: (i) failing to disclose her involvement in a private business, in contravention with the Bank's Employee's Service Agreement and the Bank's Code of Ethics and Conduct ('Code'); (ii) failing to submit the required yearly declaration form; (iii) putting herself in a state of pecuniary embarrassment; and (iv) being untruthful in an investigative interview conducted by the bank, by denying ownership and directorship of RSA. Dissatisfied with the appellant's reply to the show-cause letter issued to her, the bank dismissed the appellant from employment. The appellant challenged the said dismissal, at the Industrial Court, on the ground that it was done without just cause or excuse. Before the Industrial Court, the appellant placed heavy reliance on a memorandum that allegedly evinced a disclosure, an approval of or an acquiescence in her involvement in the business by her superior ('Dato' Aminuddin'). According to the appellant, the requisite disclosure to Dato' Aminuddin was made when he interviewed her. However, Dato' Aminuddin was not called as a witness to testify at the Industrial Court. The Industrial Court dismissed the appellant's claim. The appellant's application for judicial review of the Industrial Court's award, at the High Court, was unsuccessful. Hence the present appeal against the High Court's decision.

Held (dismissing appeal with costs)
Per S Nantha Balan JCA delivering the judgment of the court:

(1) The appellant placed heavy reliance on a memorandum allegedly signed by Dato' Aminuddin who was said to constitute an approval 'to remain as a shareholder and director of RSA Solutions Sdn Bhd due to commitments made on machineries leasing agreements with Fuji Xerox'. It was clear from the memorandum itself that the appellant was not exempted from compliance with the requirement to make annual declarations. The appellant alleged that she made the requisite disclosure to Dato' Aminuddin when he interviewed her. However, Dato' Aminuddin was not called as a witness to testify. (paras 53-55)

(2) The appellant said nothing about submitting any declaration forms or that she had submitted the memorandum. Given the dubious circumstances surrounding the provenance of the memorandum, it would not be unfair to say that the documents relied upon by the appellant before the Industrial Court, including the memorandum, were produced in circumstances which did very little to vouch for the authenticity. If the memorandum really did exist and Dato' Aminuddin did give his approval for the appellant to continue being involved in RSA, then surely and logically, the appellant would or should have brought this document to the attention of the bank when the investigative interview was conducted or, at least, when the show-cause letter was issued and finally when clarification was sought from the

appellant after she responded to the show cause letter. It would have been reasonable to expect her to do so. In fact, during the investigative interview, the appellant did not disclose the existence of the memorandum. The memorandum only surfaced when the statement of case was filed at the Industrial Court. (paras 60, 62 & 66)

(3) The appellant was no ordinary employee; she was a very senior level employee of the bank. Just because the appellant was a high-income earner, that did not mean that there was no pecuniary embarrassment. There was no presumption that a high-income earner was free from financial impecuniosity. The issue of pecuniary embarrassment became magnified when the JID was taken against the appellant. The appellant had implored Fuji Xerox for indulgence, portraying that she was not able to pay more than what she had proposed. The JID against the appellant, coupled with her plea to Fuji Xerox for indulgence culminating in a settlement agreement, were matters which would adversely impact the reputation and image of the bank. It was unthinkable that a senior employee of the bank could find herself in a financial predicament in which a JID was taken against her and, all the while, the bank was unaware of the said employee's involvement in an outside business and the liabilities that accrued as a result of such involvement. (paras 51, 78, 79 & 88)

(4) The Industrial Court had conducted a detailed review of all facts and evidence, both oral and documentary, and had drawn inferences from the evidence of the appellant and the bank. The appellant's application for judicial review was, essentially, a challenge to the findings of fact and conclusions that were made by the Industrial Court. Such findings were generally not reviewable by way of judicial review proceedings. It was not the function of the court to act as an appellate court or to use judicial review proceedings as a cloak for, or to disguise, what in essence was an appeal. The appellant's dismissal was not disproportionate or unreasonably severe, having regard to the gravity of the charges of misconduct levelled against and which were proven. (paras 93 & 96)

Case(s) referred to:

Dreamland Corp (M) Sdn Bhd v. Choong Chin Sooi & Industrial Court Of Malaysia [1988] 1 CLJ 1; [1988] 1 CLJ (Rep) 39 SC ***(refd)***

Malayan Banking Bhd, Seremban v. Kesatuan Kebangsaan Pekerja-pekerja Bank [1996] 2 ILR 144 ***(refd)***

Menara Panglobal Sdn Bhd v. Arokianathan Sivapiragasam [2006] 2 CLJ 501 CA ***(refd)***

Pearce v. Foster [1886] (17) QBD 536 ***(refd)***

Siti Dzahirah Harun v. Mahkamah Perusahaan Malaysia & Anor [2019] 1 LNS 1714 HC ***(refd)***

Siti Dzahirah Harun v. Malayan Banking Bhd [2018] 2 LNS 2141 ***(refd)***

Legislation referred to:
Evidence Act 1950, s. 114(g)
Industrial Relations Act 1967, ss. 20, 30(5)

For the appellant - Muhammad Farhan Muhammad Shafee & Zahria Eleena Ahmad Redza; M/s Shafee & Co
For the respondent - Thavalingam C Thavarajah & Rebecca Sonali Alfred; M/s T Thavalingam & Co

[Editor's note: For the High Court judgment, please see Siti Dzahirah Harun v. Mahkamah Perusahaan Malaysia & Anor [2019] 1 LNS 1714 (affirmed).]

Reported by Najib Tamby

JUDGMENT

S Nantha Balan JCA:

Introduction

[1] The appellant, Puan Siti Dzahirah Harun ("appellant") was at all material times a senior employee of Malayan Banking Berhad ("bank"). The dispute which gave rise to the appeal before us originated in the Industrial Court. In the Industrial Court, the appellant's employer was named as Malayan Banking Berhad. To this, there was no dispute. However, the intitulement in the judicial review proceedings in the High Court and in the appeal before us bore the name "Maybank Banking Berhad". However, no controversy flowed from this error and clearly, no one was misled. Suffice to say, this is not fatal to the appeal and the parties concerned are well aware of who the appellant's employer was and for all intents and purposes, the first respondent in the present appeal.

[2] The appellant held the position of Senior Relationship, Head Recruitment Operations and Strategic Account Director, Career Transaction Centre. According to the bank, the appellant committed serious misconduct and was accordingly dismissed with effect from 25 November 2016. The appellant maintained that she was dismissed without just cause or excuse and challenged the dismissal *via* a representation to the Minister for Human Resources under s. 20 of the Industrial Relations Act 1967. The appellant sought reinstatement and other reliefs. The appellant's said representation was referred to the Industrial Court of Malaysia.

[3] The Industrial Court handed down Award No. 2141 of 2018 dated 6 September 2018 ("award") wherein the appellant's claim was dismissed. The award is reported as *Siti Dzahirah Harun v. Malayan Banking Bhd* [2018] 2 LNS 2141 (IC). The appellant sought a judicial review of the award *via* Kuala Lumpur High Court Application for Judicial Review No. WA-25-367-12-2018, with a view to quash the award.

[4] On 4 July 2019 the High Court, after conducting a review of the award, dismissed the appellant's application for the reliefs sought with costs of RM4,000. See: *Siti Dzahirah Harun v. Mahkamah Perusahaan Malaysia & Anor* [2019] 1 LNS 1714 (HC). The present appeal is directed at this decision of the High Court. The appeal came up for hearing on 28 January 2022. After hearing submissions and upon due consideration of the issues which were canvassed by the parties, we found no merits in the appeal and dismissed the appeal with costs. These are our reasons for dismissing the appeal.

Misconduct

[5] In summary, the charges of misconduct against the appellant which formed the basis for her dismissal were as follows:

(i) she had failed to disclose her involvement in a private business through a company by the name of RSA Solutions Sdn Bhd (Company No. 676433-M);

(ii) she had failed to submit the required yearly declaration form;

(iii) she had put herself in a state of pecuniary embarrassment; and

(iv) she had been untruthful in the investigative interview conducted on 18 October 2016.

The Facts

[6] The appellant commenced employment with the bank as the Head, Business Relationship Management-Insurance & Takaful (Etiqa), Group Human Capital on or around 3 December 2009. (See the bank's letter of offer of employment dated 25 November 2009). She was subsequently confirmed in this position with effect from 3 June 2010. When she joined the bank, she was the majority shareholder and a director of RSA Solutions Sdn Bhd (Company No. 676433-M) ("RSA"). When she joined the bank, the appellant was also a guarantor for RSA's commercial dealing with a third party (see paras. 14 to 20 below).

[7] The appellant's employment with the bank was subject to the bank's employee's service agreement whereby she agreed that she shall not, without previous consent of the bank, engage in any private business on her own account or be employed in any way or for any purpose whatsoever for any part of her time outside business hours by any person, firm or company other than the bank.

[8] The appellant was also required to observe the bank's code of ethics and conduct ("code"). There was no dispute that the appellant had received, read and understood the contents of the code and had pledged to comply and abide by the terms stipulated therein.

[9] On 1 April 2012, the appellant was transferred laterally to the position of Head Deployment, Productivity Improvement Initiative Group Human Capital. As a result of a series of restructuring exercises which were conducted, the bank appointed the appellant to the position of Senior Relationship, Head Recruitment Operations and Strategic Account Director, Career Transition Centre. Her last drawn basic salary was RM28,594 with perquisites of a car allowance of RM3,125 and driver's allowance of RM2,000. The appellant's emoluments are relevant to the issue of pecuniary embarrassment which is dealt with in the latter part of this judgment.

The Code

[10] The bank's position was that the appellant had committed misconduct and was liable to disciplinary proceedings as she had failed to comply with the following articles in the code, namely:

> **Article 4**
>
> Article 4 – Conflict of Interest
>
> Employees must not engage directly or indirectly in any business activities that compete or conflict with the Group's interest ...
>
> ...
>
> (c) Other Employment
>
> Employees should not hold any other employment either fulltime or part time other than with the Group. An employee is expected to devote his whole time and attention as well as commitment during working hours to his job duties.
>
> **Article 20**
>
> Article 20 – Disclosure and Annual Declaration
>
> Employees are required to declare their position on conflict of interest on an annual basis irrespective of whether or not they have a conflict of interest. It is the employee's responsibility to disclose any conflict of interest and to take the necessary steps to resolve the conflict.
>
> **Article 34**
>
> Article 34 – Pecuniary Embarrassment
>
> 1. Pecuniary embarrassment from whatever cause will be regarded as necessarily impairing the efficiency of the executive and rendering himself liable to disciplinary action.
> 2. For this purpose, the expression 'pecuniary embarrassment' means that the state of an executive's indebtedness which, having regard to the amount of debt incurred by him, may in the opinion of the company cause financial hardship to him.

3. Without prejudice to the generality of the above, the executive shall also be deemed to be in pecuniary embarrassment:

   a) Where there is judgment debtor for as long as the judgment debt remains unsettled and a stay of execution has not been granted; or

   b) Where he is an adjudicated bankrupt or an insolvent wage earner, for as long as any judgment against him in favour of the Official Assignee remain unsatisfied and a stay of execution has not been granted.

4. The executive is also reminded of Section 59 of the Financial Services Act 2013, which provides for the automatic disqualification of a staff of a licensed institution from his appointment in certain cases including but not limited to when he is made a Bankrupt, has suspended payments or has compounded with his creditors whether within or outside Malaysia.

The Problem

[11] The root of the appellant's problem was her involvement in RSA. RSA was involved in a photocopying and photo-studio business. RSA was incorporated on 28 December 2004 and had an authorised share capital of 100,000 ordinary shares and an issued share capital of 50,000 ordinary shares. The appellant was a shareholder of RSA and held 25,000 of the issued share capital. On 1 February 2009, the appellant was appointed as a director of RSA.

[12] According to the bank's narrative, it was only sometime in October 2016, that they discovered the appellant's involvement in RSA. The bank had discovered that the appellant had failed to declare and provide to the bank the aforementioned information on an annual basis which was a requirement for all employees of the bank.

[13] In this regard, the bank maintained that the appellant had failed to submit the "yearly employee declaration of observance" ("yearly declaration form") for the period of 2009 until 2012 whilst holding the position of Head of Business Human Resources, Insurance & Takaful (Etiqa), Group Human Capital.

RSA's Dealings With Fuji Xerox

[14] We turn now to RSA's commercial dealings.

[15] RSA had leased photocopying equipment from Fuji Xerox Asia Pacific Pte Ltd ("Fuji Xerox"). To this end, RSA had entered into a rental agreement and service agreement dated 1 June 2009 with Fuji Xerox. The rental agreement was signed by the appellant as "Executive Director" of RSA. The appellant and one Nortinah bte Abdul Ghani ("Nortinah") were guarantors

under a "continuing guarantee and indemnity" dated 1 June 2009. Fuji Xerox was the beneficiary of the guarantee and indemnity which was provided to secure payment to Fuji Xerox in the event of RSA's default under the rental and service agreement.

[16] As events turned out, RSA's business slumped and it eventually ceased business. RSA defaulted in making payments to Fuji Xerox. There was consequently a sum of RM160,485.77 due and owing to Fuji Xerox. Fuji Xerox filed a civil suit *via* Kuala Lumpur Sessions Court Suit No. A52NCVC-372-07-2015 ("Suit 372") for recovery of the sum of RM160,485.77, wherein RSA, Nortinah and the appellant were named as defendants.

[17] On 19 August 2015, a judgment in default ("JID") for the sum of RM160,485.77 with interest accruing thereon was entered against RSA, Nortinah and the appellant.

[18] Thereafter, the appellant negotiated with Fuji Xerox and executed a settlement agreement dated 25 July 2016 ("settlement agreement") whereby the appellant agreed to settle the matter by paying a lesser sum of RM120,000 by way of monthly instalments of RM2,000 to Fuji Xerox.

[19] The settlement agreement, curiously, described the appellant as the "proprietor" of the RSA. The settlement agreement also states that judgment was entered against RSA, which gave the impression that the JID was only against RSA. In truth, the JID was against all the named defendants in Suit 372, including the appellant.

[20] In negotiating with Fuji Xerox, the appellant made a plea for indulgence for the judgment debt to be reduced to RM70,000 and to be allowed to settle this amount by way of monthly instalments of RM1,000 each. The appellant's email to the solicitor for Fuji Xerox dated 30 May 2016 is self-explanatory and read as follows:

> Date: 30/05/2016 16:00 (GMT+08:00)
> To: sharansurendren@lawyer.com
> Subject: Fuji Xerox vs RSA Solutions Sdn Bhd
>
> Dear Sharon
>
> I came to know from my friend Nortinah Abd Ghani that my husband's company RSA Solutions Sdn Bhd has been sued by Fuji Xerox. Both Nortinah and I are joint guarantors when RSA leased the copier machine from Fuji Xerox.
>
> RSA Solutions has since 2011 ceased operations as the company had incurred losses due to machines were not running because Fuji Xerox had refused to service the machines. The company was running at a loss as there was zero income from the machine from mid-2011 until 31 May 2014.

RSA has been charged full rental and service for those period of non-operation. However we were not able to pay because our machines were non-functioning. The machine was repossessed at the end of leasing agreement *ie*, in June 2014.

As my husband Rusman Sulaiman is no longer working or earning a salary, I am the only breadwinner for the family. Due to this, I would like to appeal for Fuji to consider my appeal *ie*.

1) I am requesting that the amount be reduced to RM70,000 instead of the amount demanded since the machine was not serviced since 2011 and the machine has since been repossessed.

2) I would like to propose a payment schedule of RM1,000 from June 2016 till March 2017. And the balance will be paid in a lumpsum payment in April 2017.

3) I would also like to request that Fuji to release Nortinah as the 2nd guarantor as **I shall take responsibility to fully settle the amount.**

Thank you for your consideration

Dzahirah Harun
012-2365020 (emphasis added)

Investigative Interview

[21] The bank conducted an investigative interview with the appellant on 18 October 2016. The notes of the investigation interview were acknowledged by the appellant as evidenced by her initials on the bottom right-hand corner of each page.

[22] She was informed that allegations had been made against her *viz* her involvement in outside business and that the interview was to give her an opportunity to verify the allegations. The interview was conducted by Looi Heong Meng, Head, Group Industrial Relations and Governance, Group Human Capital. He testified before the Industrial Court as the bank's first witness ("COW1"). The notes of the interview held on 18 October 2016, read as follows:

Q1: There is an allegation against you which involved you having business outside your employment. As such we need you to answer some questions in writing to verify this allegation. Can we proceed now?
Ans: Yes.

Q2: Are you involved in any business activity outside employment?
Ans: No. I'm not. Not employed. Does not own any business in my name.

Q3: How about in the past and during your tenure with the Bank?
Ans: Prior to joining the Bank, a company was opened by my husband in 2009 which was now been closed down. Also, my husband and

my daughter-in-law has opened a boutique because my daughter-in-law is interested in fashion. I am, however, not a shareholder or owner named in this company.

Q4: What is the name and the company that was opened in 2009?
Ans: RSA Solutions Sdn Bhd.

Q5: What sort of business the company was doing at that time?
Ans: Photocopying and photo studio.

Q6: Who managed this company?
Ans: Shop was managed by my sons and my husband.

Q7: Is the company still operating the business?
Ans: Shop has closed down about 6 years ago.

Q8: Are you listed as one of the shareholder?
Ans : No.

Q9: Did you hold any position in RSA Solutions Sdn Bhd?
Ans: Not that I can recall.

Q10: Did you disclose the business activity at the time when you joined the Bank?
Ans: Yes I did. I informed Dato' Aminuddin Mat Desa about it. And he said it isn't a problem because it's a family business. He even disclose he also has a family business.

Q11: Do you know that as an employee of the Bank/Group that is a policy that employees are not allowed to be involved directly/indirectly in business during their employment with the Bank
Ans: Yes I am aware of the Bank's policy?

Q12: How did you inform Dato' Amin regarding the business activities?
Ans: It was in a conversation I think during the interview session with him in his room in Nov 2009.

Q13: Did you disclose your business activities to the Bank during that for the Annual Disclosure (illegible)?
Ans: I did not disclose because it is not a business anymore as it ceased operating 6 years ago.

Q14: Did this Company (RSA Solution Sdn Bhd owed any party/parties money?
Ans: The contract with Fuji Xerox was terminated early as the shop closed. So yes, the company owe Fuji the lease for balance of contract. But the co. and Fuji has come to an agreed settlement. **RSA pays Fuji RM2,000 monthly until settlement.**

Q15: How much was this total amount owing?
Ans: RM120,000.

Q16: Was there a court order filed by Fuji Xerox earlier on?
Ans: I wasn't aware of a court order until the 2nd guarantor, Nortinah applied for a job with RHB and was informed of it.

Q17: Do you have anything to add?
Ans: As I am not familiar with how to close a company, RSA Solutions has not been properly closed as a company even though the company has ceased operations 6 years ago and no further business has been transacted by the company which was a printing shop.

I have no intention to hide the information should I be aware of what should be done to remove my name from the shareholding of the company. As I have declared to my then CEO Dato' Aminuddin that I had set up a company for my family before joining Etiqa.

Interview ended at (illegible) pm on 18/10/2016 (emphasis added)

Show-Cause

[23] Upon completion of the investigation, the bank issued a show-cause letter, dated 27 October 2016, to the appellant containing four allegations of misconduct. The opening paragraphs of the bank's show-cause letter read as follows:

Dear Puan Dzahirah,

Show-Cause

It has been reported that you are a director and shareholder of RSA Solutions Sdn Bhd. The said company is/was involved in the printing business and had rented equipment from Fuji Xerox Asia Pacific Pte Ltd as evidenced from a Rental Agreement No C50014050 executed by you with the said company in your capacity as the Executive Director of RSA Solutions Sdn Bhd. However, RSA Solutions Sdn Bhd could not fulfil its obligations and subsequently, Fuji Xerox Asia Pacific Pte Ltd had, on 19/8/2015 obtained a Judgment in Default for RM160,485.77 against RSA Solutions.

Consequent to that, you had, on 25/7/2016 entered into a Settlement Agreement with Fuji Xerox Asia Pacific Pte Ltd to pay RM120,000 as full and final settlement of the debt owed to Fuji Xerox Asia Pacific Pte Ltd.

Based on our search with Suruhanjaya Syarikat Malaysia, it was revealed that RSA Solutions Sdn Bhd was incorporated on 28/12/2004 and you were appointed as one of its directors on 1/2/2009 and you were and had remained the majority shareholder of the said company based on your shareholding of 25,000 shares. The other material shareholders are your spouse, Encik Rusman bin Sulaiman and your son, Encik Mohd Fahmy bin Rusman who held 12,499 shares each. The remaining 2 nominal shareholders with one share each are Puan Salasiah binti Mohd Said and Puan Asiah binti Osman.

However, during the investigative interview held between you and the undersigned on 18/10/2016, you denied owning any business or hold any position in RSA Solutions Sdn Bhd. Further, you failed to declare your involvement in the said business at the point of your hiring as Head of Business HR Insurance & Takaful on 3/12/2009 and the subsequent years thereafter.

This is a contravention of Article 20 of the relevant Code of Ethics & Conduct for employees within Mayban Fortis Group of Companies which stipulates under Disclosure & Annual Declaration that, "Employees are required to declare their position on conflict of interest on an annual basis irrespective of whether or not they have a conflict of interest. It is the employee's responsibility to disclose any conflict of interest and to take the necessary steps to resolve the conflict." Further, Article 4(c) of the same Code stipulates under Other Employment that, "Employees should not hold any other employment either full time or part time other than with the Group. An employee is expected to devote his whole time and attention as well as commitment during working hours to his/her job duties."

Charges Of Misconduct

[24] The charges (allegations) of misconduct against the appellant per the show-cause letter read as follows:

(i) You had failed to disclose your involvement in a private business known as RSA Solutions Sdn Bhd at the point of your hiring as the Head of Business HR Insurance & Takaful on 3/12/2009, and the subsequent years thereafter *albeit* our search with Suruhanjaya Syarikat Malaysia revealed that you were appointed as a director of RSA Solutions Sdn Bhd with the majority shareholding in the said Company since 1/2/2009 thus contravening Articles 20 and 4 of the Code of Ethics & Conduct for employees within Mayban Fortis Group of Companies;

(ii) You had, whilst holding the position of Head Business HR Insurance & Takaful between January 2009 and April 2012 and being responsible for ensuring that all staff of Maybank Insurance Group completed the "Yearly Employees Declaration of Observance" and disclose your involvement with RSA Solutions Sdn Bhd thus, breaching Article 20 of the Maybank Insurance Group Code of Ethics and Conduct.

(iii) You had, in your capacity as a Senior Management of the Bank put yourself in a state of pecuniary embarrassment as evidenced from the Settlement Agreement entered between you, the 2nd party and proprietor of RSA Solutions Sdn Bhd (as stated in the said agreement) with the 1st party, Fuji Xerox Asia Pacific Pte Ltd on 26/7/2016 to pay RM120,000 as full and final settlement of the debt owing to Fuji Xerox Asia Pacific Pte Ltd following their obtainment of the Judgement of Default against RSA Solutions Sdn Bhd for RM160,485.77 on 19/8/2015; and

(iv) You were untruthful during the investigation interview conducted by the undersigned with you on 18/10/2016 where you denied owning any business nor do you hold any position in any company contrary to the investigation findings that you had and/or were a director and majority shareholder of RSA Solutions Sdn Bhd since 1/2/2009 as per your appointment date.

Appellant's Reply

[25] On 14 November 2016, the appellant submitted her reply to the show cause letter. Her response was rather brief. She stated the following:

Your letter dated 27 October 2016 on the above is hereby referred.

The following are my responses:

i. I have declared having a family owned business Le. RSA Solutions Sdn Bhd during my interview with the then CEO, Dato' Aminuddin Md Desa. And again, had declared it when I reported for work in Etiqa in December 2009.

ii. Please note that when I set up RSA Solutions Sdn Bhd in February 2009, I was not an employee of Etiqa nor was I employed by any employer.

iii. The judgement was between Fuji Xerox and RSA Solutions Sdn Bhd.

iv. I was being truthful when I stated that I have declared setting up RSA Solutions Sdn Bhd as a family business during my interview with the then CEO Mayban Fortis Holdings Berhad as it was listed as my current (then) employment. (emphasis added)

COW1 Sought Clarifications

[26] On 15 November 2016, COW1 wrote to the appellant and sought clarification. His email to the appellant read as follows:

From: Looi Heong Meng
Sent: Tuesday, 15 November, 2016 3:36 PM
To: Dzahirah Harun
Cc: Lim Beng Choo
Subject: Show cause

Dear Puan Dzahirah,

Thank you for your response to our show cause letter.

However I would like you to clarify your explanation as per item 1. In your email, you mentioned that again you had declared it when you reported for work In December 2009, **my question is who you had declared to and was the declaration done in writing?** I also notice that you did not touch on any mitigating factors. Do you wish to submit your mitigating factors for management to consider before deciding on the case.

(emphasis added)

[27] On 16 November 2016, COW1 reminded the appellant to render a response to his earlier email. His email read as follows:

> From: Looi Heong Meng
> Sent: 15 November 2016 at 10:39:56 AM MYT
> To: Dzahirah Harun
> Cc: Lim Beng Choo
> Subject: Show cause
>
> Further to my email to you yesterday, Would appreciate it if you could provide your clarification to me by today.
>
> Thank you.

Appellant – "Nothing Further To Add"

[28] The appellant's response to COW1's reminder for clarification was simply that she had "nothing further to add" to her earlier response. She stated the following in her response:

> From: Dzahirah Harun
> Sent: Wednesday, 16 November, 2016 10:57 AM
> To: Looi Heong Meng
> Subject: Show cause
>
> Dear Sirs
>
> Thank you for your emails on above. However please be informed that **I have nothing further to add to my earlier response on same.**
>
> Thank you and best regards
> Dzahirah Harun
> PF 83748 (emphasis added)

Dismissal

[29] It is important to note that in her response to the show-cause notice the appellant was totally silent as to the existence of any declaration form which she claimed had been submitted, or as to the existence of an alleged memorandum dated 3 December 2009. According to the bank, the appellant's reply to the show-cause letter was not to their satisfaction, taking into account the senior position the appellant held and the level of trust and responsibility associated with it, the bank could no longer repose the necessary trust and confidence in her necessary for the appellant's continued employment with the bank. The bank was therefore left with no alternative but to dismiss the appellant from service with immediate effect on 25 November 2016.

Representation Under s. 20 Industrial Relations Act 1967

[30] The appellant was dissatisfied with the bank's decision. She filed a representation to the Industrial Relations Department pursuant to s. 20 of the Industrial Relations Act 1967 claiming that she was dismissed without just

cause or excuse. The Minister for Human Resources referred the appellant's representation to the Industrial Court for adjudication. The case was heard by the Industrial Court on 7 June 2018.

[31] The appellant testified before the Industrial Court. She did not call any other witness to testify on her behalf. The bank produced two witnesses namely Looi Heong Meng ("COW1") and Hazmy bin Halid (Head, Employees Engagement) ("COW2").

[32] On 6 September 2018, the Industrial Court handed down the award dismissing the appellant's claim.

The Alleged Memorandum

[33] Before the Industrial Court, the thrust of the appellant's rebuttal in regards to the allegation of non-declaration, conflict of interest and involvement in outside business, was her reliance on an alleged memorandum dated 3 December 2009. It was maintained by the appellant that this memorandum evidenced an approval of or acquiescence in her involvement in the business by her superior Yang Bhg Dato' Aminuddin Md Desa ("Dato' Aminuddin") who was the then Head, Insurance & Takaful. The memorandum read as follows:

> From the desk of:
> DZAHIRAH HARUN
> Head, Business HR
> Insurance & Takaful
>
> **Memorandum**
>
> Date: 3 December 2009
>
> To: YBhg Dato' Aminuddin Md Desa
> Head, Insurance & Takaful
>
> YBhg. Dato' Aminuddin
>
> **Yearly Employees Declaration Of Observation – RSA Solutions Sdn Bhd Type Of Business Business Centre/Print Shop**
>
> The above business was set up prior to joining Kumpulan Maybank. It is a family business and had been set up meant for husband's post retirement job and sons' employment. I hereby seek an approval from YBhg. Dato' to remain as a shareholder and director of RSA Solutions Sdn Bhd due to commitments made on machineries leasing agreements with Fuji Xerox.
>
> Your approval is hereby sought.
>
> Approved by
>
> Dzahirah Harun — Dato' Aminuddin Md Desa
> Head, Insurance & Takaful

[34] The authenticity of this memorandum was, however, impugned by the bank.

Industrial Court

[35] The Industrial Court analysed the issue in regard to the impugned memorandum and the appellant's contention that she had submitted the declaration form on 4 December 2009 together with the impugned memorandum. The Industrial Court's analysis and conclusion were as follows:

> [13] (i) The Claimant contended that in 2009, during her interview with Dato' Aminuddin Md Desa, Head, Business HR Insurance & Takaful, she had declared to him her interests in RSA Solutions, which was her family company and that she had obtained his approval *vide* a memorandum headed From the desk of (the Claimant).
>
> *She produced what purported to be a copy of this memorandum (CLB-1, page 136).* She also contended that she had submitted the Yearly Declaration Form for 2009 to the Bank and for this she alluded to pages 137-139 of CLB-1.
>
> (ii) However, COW1 testified that he only became aware of these documents upon seeing CLB1 that is, after its filing in court. Furthermore, COW2, the Head of Employee Engagement, Etiqa Takaful Berhad at the material time who was the person responsible for keeping the Yearly Declaration Forms, testified that these documents were never in the Claimant' personal file.
>
> *The court notes that in her said reply to the show cause letter the Claimant made no mention of these documents. The Court also notes that the Claimant was unable to recall whether she had submitted the Yearly Declaration Form for the years 2010, 2011 and 2012.* The Court finds this to be very odd since the Claimant by virtue of her position was responsible for ensuring that all staff complete and submit this form. *It was incumbent on her to call Dato' Aminuddin to corroborate her but she failed to do so. This gives the Court cause to invoke Section 114 (g) of the Evidence Act 1950 and to presume that, had she done so, Dato' Aminuddin would have given evidence adverse to her case.*
>
> In the circumstances *the Court cannot ascribe any authenticity to CLB1, page 136. When challenged, in cross-examination, to show proof that Dato'' Aminuddin had exempted her from having to file the Yearly Declaration for the years 2010, 2011 and 2019 the Claimant replied "Not in Court".*
>
> (iii) The Claimant contended, also, that the Bank had failed to properly keep its employees records. Her counsel even put it to COW2 that the Claimants' successor may have shredded some documents in her room. However COW2 testified that the Yearly Declaration Forms were kept not in this room but in the employees' respective personnel files. The Court finds that the possibility of these Forms having been shredded to be too remote and that on a balance of probabilities, the Claimant did not file the Forms for the years in question. (emphasis added)

[36] The Industrial Court then dealt with the settlement agreement and the issue of the appellant placing herself in a situation of pecuniary embarrassment.

> [14] The Claimant, in an effort to settle the judgment sum of RM160,485.77, executed a Settlement Agreement to pay a reduced amount of RM120,000. The Bank submits that the Claimant had thereby placed herself in a position of pecuniary embarrassment. It was COW1's testimony that the Claimant had also failed to disclose this state of pecuniary embarrassment to the Bank.
>
> The Claimants' counsel submits that **executing the Settlement Agreement does not create a position of pecuniary embarrassment since the Claimant had the financial capacity to pay the agreed sum.** Not so, submits the Bank, because the Claimant had appealed to Fuji Xerox's Solicitors (COB-1 pages 90-91) requesting instalment terms "as my husband Rusman Sulaiman is no longer working or earning a salary, I am the only breadwinner for the family". It is the finding of this Court that the Claimant did place herself in a position of pecuniary embarrassment. It has been held by the Industrial Court that this constitutes a misconduct. See, for example the case of *Malayan Banking Berhad, Seremban v. Kesatuan Kebangsaan Pekerja-Pekerja Bank* [1996] 2 ILR 144, the rationale, clearly, being that such pecuniary embarrassment of a bank employee is prejudicial to the interest, if not the reputation, of the bank. (emphasis added)

[37] And in regard to the appellant's untruthfulness during the investigative interview the Industrial Court held as follows:

> [15] At the outset of the investigative interview by COW1 the Claimant had denied any involvement in RSA Solutions, stating that she was not a shareholder and did not recall holding any position in RSA Solutions. **She had been untruthful.** It was only towards the end of the interview that she made an admission in this regard. In her counsel's written submission she took issue with the fact that the interview had been conducted by COW1 alone. The court find this to be a non-issue and accepts COW1's explanation that this was so as not to embarrass the Claimant. As another line of attack her counsel submits that the interview questions were drafted in such a way as to mislead her to believe that the purpose of the interview was to understand the state of affairs and business activities of RSA Solutions. This was denied by COW1 who, during his cross-examination, had testified that he had duly informed the Claimant the purpose of the investigative interview. The court has scrutinised the interview notes (COB1 pages 58 to 63) and notes that the Claimant had given her answers to the questions posed in her own handwriting. The Court finds nothing in this question-and-answer session to suggest that the Claimant was in any way misled as to the purpose of the interview.

In fact the very first question posed was:

Q1: There is an allegation against you which involves you having business outside your employment as such we need you to answer some questions in writing to verify this allegation. Can we proceed?

The Claimants' answer to this question was a very unqualified "yes."

The court accordingly finds that the Claimant had been untruthful during the investigative interview. (emphasis added)

[38] The Industrial Court concluded that the bank had proven the charges of misconduct as per the show-cause letter and that whilst the bank may not have followed the two-staged disciplinary procedure, the appellant had not been prejudiced. The Industrial Court held that the absence of domestic inquiry was not of itself fatal and that as the matter was now before the Industrial Court; the issues in relation to the charges of misconduct would be heard *de novo* before the Industrial Court. See: *Dreamland Corp (M) Sdn Bhd v. Choong Chin Sooi & Industrial Court Of Malaysia* [1988] 1 CLJ 1; [1988] 1 CLJ (Rep) 39; [1988] 1 MLJ 111 (SC).

[39] The Industrial Court was satisfied that the rules of natural justice were observed and the appellant was given every opportunity to offer credible responses so as to repudiate the serious charges of misconduct against her. But, the appellant failed to satisfactorily answer the charges levelled against her. The Industrial Court was satisfied that the bank had proven the charges of misconduct.

[40] And, in regard to the severe punishment of dismissal, the Industrial Court found that it was justified in the circumstances. In this regard, the Industrial Court opined:

[19] The Claimant held a very senior position in the Bank. More than just holding a position of trust, she was the enforcer of the Banks' policies. She had breached this trust that the Bank had reposed in her and she had aggravated such breach by being untruthful at the investigative interview. In the circumstances the Court cannot fault the Bank for deciding that it could no longer keep the Claimant in its employment. The dismissal was with just cause and excuse.

[41] The appellant in consequence filed an application for judicial review to quash the award on the grounds that the Industrial Court had committed errors of law. The appellant sought the following reliefs:

(i) an order of *certiorari* to quash and/or invalidate the award;

(ii) an order of reinstatement of the appellant's original position without loss of earnings, benefits, services, seniority, special entitlements or any other benefits in any forms; and

(iii) alternatively, the bank is to pay damages or reparation to the appellant due to the wrongful dismissal.

[42] After exercising its review of the award, the High Court dismissed the application for the reliefs sought. The High Court analysed the Industrial Court's findings per the award and found that the Industrial Court did not commit any jurisdictional error and that the award did not suffer from any procedural impropriety, illegality or irrationality.

[43] The High Court dealt with the appellant's complaint that the Industrial Court did not take into account her allegation that the bank had breached the rules of natural justice during the inquiry process.

[44] The appellant had also contended that the bank had failed to verify what she had maintained, *ie*, that she had made the requisite disclosures to Dato' Aminuddin and obtained his approval.

[45] In this, it was implicit in the appellant's contention that the burden was upon the bank to verify her contention.

[46] The judge dealt with the impugned memorandum and the issue of whether it was incumbent on the part of the bank to have elicited an explanation or confirmation from Dato' Aminuddin.

[47] The High Court agreed with the Industrial Court that it was the appellant's burden to call Dato' Aminuddin to testify before the Industrial Court. After all, that was her case.

[48] The High Court's analysis and conclusions on the appellant's complaints that the Industrial Court had committed errors of law (per the grounds of judgment wherein the Industrial Court had been referred to as "first respondent") are reproduced below:

> [41] The Applicant was asked during the interview about how she informed Dato' Aminuddin regarding her business activities and the Applicant answered that it was in a conversation during the interview session with Dato' Aminuddin in his room in November 2009. The Applicant also claimed that she had obtained Dato' Aminuddin's approval *vide* a Memorandum headed from the desk of (the Applicant). The Applicant produced the Memorandum during trial before the 1st Respondent.
>
> She also contended that she had submitted the Yearly Declaration Form for 2009 to the Bank and referred the related documents at pages 137-139 of CLB1.
>
> [42] The 1st Respondent in his award had considered the COW1's evidence and confirmed that COW1 only became aware of these documents upon seeing CLB1 after its filing in court. The Applicant made no mention of the documents in her said reply to show cause letter to the Bank.

[43] COW2, the Head of Employee Engagement, Etiqa Takaful Berhad at the material time who was the person responsible for keeping the Yearly Declaration Forms, testified that these documents were never in the Applicant's personal file. The Applicant was also unable to recall whether she had submitted the Yearly Declaration Form for the years 2010, 2011 and 2012. The reasons given by the Applicant was very odd since the Applicant by virtue of her position was responsible for ensuring that the staff complete and submits the form. It was incumbent on her to call Dato' Aminuddin to support and corroborate her but she failed to do so. When challenged, in cross-examination, to show proof that Dato' Aminuddin had exempted her from having to file the Yearly Declaration Form for the years 2010, 2011 and 2012 the Applicant replied "not in Court".

[44] The employee's obligation to declare his/her position on conflict of interest is a yearly obligation. Even if Dato' Aminuddin had given his approval (which was denied by the Bank), the Applicant had failed to produce any evidence before the 1st Respondent that she had indeed submitted her Yearly Declaration Form for the years 2010, 2011 and 2012 respectively.

[45] The Applicant had testified before the 1st Respondent that Dato' Aminuddin has agreed to come to court to confirm about what she had said but chose not to do so. In such circumstances, the 1st Respondent could not ascribe any authenticity to CLB1 page 136. The 1st Respondent had rightly invoked s. 114(g) of the Evidence Act 1950 and presumed that had the Applicant done so, Dato' Aminuddin would have given evidence adverse to her case.

[46] The Applicant's employment was subject to an Employee's Service Agreement by which she had agreed that she shall not without the previous consent by the Bank engaged in any private business on her own account or be employed in any way or for any purpose whatsoever for any part of her time outside business hours by any person firm or company other than the Bank.

[47] The Applicant was also required to observe the Bank's Code of Ethics and Conduct. When she was promoted as aforesaid on 1.10.2010, she was informed that her employment shall be governed by the terms and conditions of employment for Band D which stipulates, *inter alia* that she was required to observe the Bank's said Code. Article 34 thereof stipulates that she is not to place herself in a position of pecuniary embarrassment. The Applicant in the interview acknowledged and aware about the Bank's policies and yet she failed to complied with.

[48] The Applicant failed to disclose any irrationality or illegality contained in the impugned Award by the 1st Respondent.

[49] Whether the1st Respondent had erred in law when making a finding that the Bank had duly complied with the rules of natural justice before deciding to dismiss the Applicant without due consideration of the facts raised at the Industrial Court hearing. The Applicant said that the 1st

Respondent did not considered that the Bank had breached the rules of natural justice during their inquiry process. The Applicant contended that the Bank had not verified key facts from Dato' Aminuddin after her reply to the show cause letter and she was dismissed without having a proper forum wherein she was not given the opportunity to clarify her position before a neutral panel. The Applicant had merely made a bare assertion that she had declared her position of conflict of interest to Dato' Aminuddin as the same was not supported by any evidence. After considering the Applicant's reply to the show cause letter, COW1 had specifically questioned the Applicant in a subsequent email to clarify whether the declaration was made in writing, to which no answer was forthcoming from the Applicant.

[50] The absence of a domestic inquiry is not fatality but a mere irregularity. It was for the Bank to justify its actions before the 1st Respondent by leading all relevant evidence before it. This principle was enunciated in the Supreme Court case of *Dreamland Corporation (M) Sdn Bhd v. Choong Chin Sooi & Anor* [1988] 1 MLJ 111, at p 115-116.

[51] The 1st Respondent had duly considered s. 30(5) of the IRA 1967 which requires the court to act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form. This Court finds that the 1st Respondent had made a correct finding of fact in concluding that the Bank had duly complied with the rules of natural justice and procedural fairness when it carried out the investigation interview.

[52] Whether the Bank had erred in law when making a finding that the Settlement Agreement dated 25.7.2016 places the Applicant in a position of 'pecuniary embarrassment' without proper consideration of the appropriate "test" for pecuniary embarrassment and taking into account irrelevant facts to support the decision.

This court refers to Article 34 of Code of the Bank's "Terms and Conditions of Employment for Band D" (exhibit "DH4" the Applicant Affidavit in Support at page 72). Article 34 reads:

ARTICLE 34 – PECUNIARY EMBARRASSMENT

1. Pecuniary embarrassment from whatever cause will be regarded as necessarily impairing the efficiency of the executive and rendering himself liable to disciplinary action.

2. For this purpose, the expression 'pecuniary embarrassment' means that the state of an executive's indebtedness which, having regard to the amount of debt incurred by him, may in the opinion of the company cause financial hardship to him.

3. Without prejudice to the generality of the above, the executive shall also be deemed to be in pecuniary embarrassment:

   a) Where there is judgment debtor for as long as the judgment debt remains unsettled and a stay of execution has not been granted; or

b) Where he is an adjudicated bankrupt or an insolvent wage earner, for as long as any judgment against him in favour of the Official Assignee remain unsatisfied and a stay of execution has not been granted.

4. The executive is also reminded of Section 59 of the Financial Services Act 2013, which provides for the automatic disqualification of a staff of a licensed institution from his appointment in certain cases including but not limited to when he is made a Bankrupt, has suspended payments or has compounded with his creditors whether within or outside Malaysia.

[53] The Applicant contended that, taking into account the settlement sum agreed and the Applicant's financial capacity at the time of her dismissal, the Applicant could not be said to be in a state of pecuniary embarrassment.

The Bank submits that if the Applicant was indeed in the financial capability to settle the agreed sum, she would not have appealed to the solicitor of Fuji Xerox to settle the matter by paying a lesser sum of RM120,000.00 by way of monthly instalments citing several reasons as evident at pages 90-91 of COB1.

Page 91 COB1 reproduced as below:

> As my husband Rusman Sulaiman is no longer working or earning a salary, I am the only sole breadwinner for the family. Due to this, I would like to appeal for Fuji to consider my appeal.

[54] The Bank submits that by doing so, the Applicant had placed herself in a position of pecuniary embarrassment contrary to the express terms of her employment. COW1 had accordingly confirmed in his evidence in chief that the Applicant had also failed to disclose her state of pecuniary embarrassment to the Bank.

[55] The 1st Respondent had rightly held in the impugned Award that the Applicant had placed herself in a position of pecuniary embarrassment as follows:

The Claimants' counsel submits that executing the Settlement Agreement does not create a position of pecuniary embarrassment since the Claimant had the financial capacity to pay the agreed sum. Not so, submits the Bank, because the Claimant had appealed to Fuji Xerox's Solicitors (COB1 pages 90-91) requesting instalment terms "as my husband Rusman Sulaiman is no longer working or earning a salary, I am the only breadwinner for the family". It is the finding of this Court that the Claimant did place herself in a position of pecuniary embarrassment. It has been held by the Industrial Court that this constitutes a misconduct. See, for example the case of *Malayan Banking Berhad, Seremban v. Kesatuan Kebangsaan Pekerja-Pekerja Bank* [1996] 1 ILR 144, the rationale, clearly, being such pecuniary embarrassment of a bank employee is prejudicial to the interest, if not the reputation, of the bank.

A [56] Conclusion

After having considered the Applicant's application for judicial review and submissions of the parties, it is the finding of this Court that the 1st Respondent had correctly applied the legal procedure pertaining to the evidential burden of parties. The 1st Respondent had evaluated all
B evidence thoroughly and gave its reasons to support its findings before deciding to dismiss the Applicant. The findings of the 1st Respondent are consistent with the facts and evidence led before him.

[57] The 1st Respondent had acted within the proper scope of its statutory function, no irrationality and no procedural impropriety in the process of handing down the Award. The 1st Respondent had acted in accordance
C with the principles of equity and good conscience in concluding that the Applicant was in a position of pecuniary embarrassment.

[58] Accordingly, this court dismiss the Applicant's application for judicial review to quash the Award of the 1st Respondent dated 6.9.2018 with cost of RM4,000.00.

D

Our Analysis

[49] We have examined the record of appeal and in particular, the analysis and reasons given by the Industrial Court (per the award) in arriving at its decision to dismiss the appellant's claim for dismissal without just cause or
E excuse. We have also duly examined the reasons given by the High Court for dismissing the reliefs sought pursuant to the judicial review. It is obvious from a perusal of the award that the Industrial Court had made pertinent findings of fact based on the evidence that was presented.

[50] Essentially, we find that the award reveals that the Industrial Court
F had meticulously trawled through the evidence and eventually disbelieved the appellant's evidence in regard to the so-called declaration or disclosure to Dato' Aminuddin about her involvement in RSA or as to the genuineness of the impugned memorandum, and the declaration form which she claimed had been submitted when she joined the bank on 3 or 4 December 2009.

G **[51]** In amplification, the first point to be noted is that the appellant was no ordinary employee. She was in fact a very senior level employee of the bank. Undoubtedly, the appellant was herself under a duty to ensure that the code was enforced and that her subordinates duly complied with the code. And one of the terms of her employment was that an employee, "shall not
H without the previous consent of the bank engage in any private business on her own account or be employed in any way or for any purpose whatsoever for any part of her time outside business hours by any person, firm or company other than the bank".

[52] The appellant was also required to observe the code and the appellant
I had received, read and understood the contents of the code and pledged to comply and abide by the terms stipulated therein. The bank dismissed the appellant on the grounds that she had committed misconduct, namely:

(i) she had failed to disclose her involvement in private business through a company by the name of RSA;

(ii) she had failed to submit the said yearly declaration form;

(iii) she had put herself in a state of pecuniary embarrassment; and

(iv) she had been untruthful in the investigative interview conducted on 18 October 2016.

[53] The appellant placed heavy reliance on the impugned memorandum (allegedly) signed by Dato' Aminuddin who was said to constitute an approval "to remain as a shareholder and director of RSA Solutions Sdn Bhd due to commitments made on machineries leasing agreements with Fuji Xerox". It is clear from the very impugned memorandum itself that the appellant was not exempted from compliance with the requirement to make annual declarations.

[54] The appellant alleged that she made the requisite disclosure to Dato' Aminuddin when he interviewed her in 2009. In her statement of case, the appellant stated as follows:

> 13. Pihak Menuntut juga menegaskan bahawa apabila beliau melaporkan diri untuk mula berkhidmat, Dato' Aminuddin sebagai Pegawai Atasan beliau dalam bahagian Insurans & Takaful telah mengeluarkan satu Memorandum bertarikh 03/12/2009 (selepas ini dirujuk sebagai "Memorandum") bagi mengakui pengisytiharan yang telah dibuat oleh Pihak Menuntut mengenai Kepentingan tersebut dan membenarkan Pihak Menuntut untuk terus menjadi pengarah dalam RSA Solutions.
>
> 14. Pihak Menuntut selanjutnya menegaskan pada 04/12/2009, beliau telah mengemukakan Memorandum tersebut sebagai dokumen sokongan dalam 'Yearly Employees Declaration of Observance', bagi memenhi (*sic*) amalan biasa ('standard practice') Syarikat. Ini bertujuan untuk mengisytiharkan secara formal Kepentingan tersebut kepada pihak sumber manusia kumpulan Syarikat.

[55] But Dato' Aminuddin was not called as a witness to testify. The appellant admitted that she had approached him and he agreed to testify, but she did not proceed to call him as a witness.

[56] Her testimony was as follows:

> Q: Adakah anda akan memanggil Dato' Aminuddin Md Desa sebagai saksi anda untuk kes ini?
>
> A: I did. He agreed but I did not proceed. No he's not coming.

[57] The Industrial Court opined (and the High Court agreed) that it was the appellant's burden to call Dato' Aminuddin. As she had not called Dato' Aminuddin to testify, the Industrial Court drew an adverse inference against the appellant under s. 114(g) of the Evidence Act 1950. Further, the Industrial Court expressed scepticism and doubt as to the authenticity of the impugned memorandum.

[58] Further, the bank's witness (COW1) who conducted the investigative interview, testified that the impugned memorandum was not produced at the interview, not even after she was issued with a show-cause letter.

[59] And, pertinently, even after the appellant gave her response to the show-cause, she was asked whether she made the disclosure in writing. She replied to say she had "nothing to add". It is of course perplexing that if the impugned memorandum did exist and was a genuine document, why was it not produced during the interview, or in response to the show-cause or in response to COW1's emails of 15 November and 16 November 2016? The appellant referred to declaration forms, which according to COW2, were not found in her personal file.

[60] It may be recalled that during the interview, the appellant said that she had made the disclosure to Dato' Aminuddin during a conversation. She, however, said nothing about submitting any declaration forms or that she had submitted the impugned memorandum. Thus, given the dubious circumstances surrounding the provenance of the impugned memorandum, it would not be unfair to say that the documents relied upon by the appellant before the Industrial Court, including the impugned memorandum, were produced in circumstances which did very little to vouch for their authenticity.

[61] Before the Industrial Court, the appellant said that she had made the yearly declarations, but she then went on to say that the documents were not in court. She testified that she did not bring up the existence of the impugned memorandum during the interview with COW1 because she feared that she would not be fairly assessed. The appellant's answer, however, defies both logic and reason.

[62] In our view, if the impugned memorandum did really exist and Dato' Aminuddin did give his approval for the appellant to continue being involved in RSA, then surely, and logically the appellant would or should have brought this document to the attention of the bank when the interview was conducted, or at least when the show-cause letter was issued and finally when COW1 sought clarification from the appellant after she had responded to the show-cause letter. It would have been reasonable to expect her so to do. Instead, all appellant had to say was, "nothing to add".

[63] The Industrial Court made a finding of fact that the appellant did not file the declaration forms for the years in question. Thus, the appellant's evidence that she submitted the declaration form was disbelieved by the Industrial Court. Further, the Industrial Court had also made a finding of fact that the appellant was not truthful when she was interviewed by COW1.

[64] Indeed, it is clear from the interview notes that the appellant was not candid in her response to the questions that were posed by COW1. She was untruthful when she told COW1 that she was not a shareholder in RSA and could not recall whether she held any position in RSA.

[65] It is to be noted that she was at all times a substantial shareholder and a director of RSA. She also told COW1 that RSA was paying off the debt to Fuji Xerox when in fact it was the appellant, personally, who had undertaken to settle the judgment debt with Fuji Xerox *via* the settlement agreement.

[66] During the interview, she did not disclose to COW1 the existence of the impugned memorandum. The impugned memorandum only surfaced when the statement of case was filed in the Industrial Court.

[67] During the investigative interview, the appellant was asked, "Did you disclose the business activity at the time when you joined the bank?" and she answered, "Yes, I did. I informed Dato' Aminuddin Mat Desa about it. And he said it isn't a problem because it's a family business. He even disclosed he also has a family business."

[68] She was then asked, "Do you know that as an employee of the bank/group that is a policy that employees are not allowed to be involved directly/indirectly in business during their employment with the bank?" and she answered, "Yes I am aware of the bank's policy".

[69] To the specific question, "How did you inform Dato' Aminuddin regarding the business activities?", the appellant said, "It was in a conversation I think during the interview session with him in his room in Nov 2009."

[70] On the issue of pecuniary embarrassment, the High Court noted that the appellant's response was based on the applicant's financial capacity at the time of her dismissal and, taking into account the settlement sum and monthly payment of RM2,000, she could not be said to be in a state of pecuniary embarrassment.

[71] However, the bank's position was if the appellant did indeed have the requisite financial capability to settle the agreed sum, then she would not have appealed to Fuji Xerox to settle the matter by paying a lesser sum of RM120,000 by way of monthly instalments citing several reasons that are evident from her email to the solicitor for Fuji Xerox namely, "As my

husband Rusman Sulaiman is no longer working or earning a salary, I am the only sole breadwinner for the family. Due to this, I would like to appeal for Fuji to consider my appeal."

[72] Thus, it was submitted for the bank that by doing so, the appellant was implicitly stating that she could only afford RM1,000 per month and had thus placed herself in a position of pecuniary embarrassment, contrary to the express terms of her employment. And in this regard, COW1 had accordingly confirmed in his evidence in chief that the appellant had also failed to disclose her state of pecuniary embarrassment to the bank.

[73] In this regard, it may be noted that during the interview, the appellant did not disclose that she had undertaken "full responsibility" to settle the outstanding sum per the settlement agreement.

[74] Indeed, she informed COW1 that under the settlement, payment would be made by RSA.

[75] During the interview, COW1 asked, "Did this company (RSA Solutions Sdn Bhd owed any party/parties money?" and she answered, "The contract with Fuji Xerox was terminated early as the shop closed. So yes, the company owe Fuji the lease for balance of contract. But the co. and Fuji have come to an agreed settlement. RSA pays Fuji RM2,000 monthly until settlement."

[76] That answer was obviously untruthful and RSA was not the paymaster. Rather it was the appellant who personally undertook to settle the agreed amount.

[77] The High Court agreed with the Industrial Court's conclusion that the appellant had placed herself in a position of pecuniary embarrassment. The fact that the appellant appealed to Fuji Xerox to reduce the amount outstanding to RM70,000 coupled with an offer to pay a monthly sum of RM1,000 in satisfaction thereof on the grounds that her husband was not an income earner, and she was the sole breadwinner, was a manifestation of a person who had financial problems. No doubt the appellant was earning a basic salary of RM28,594 per month, but that of itself does not mean that the Industrial Court could ignore the plea for indulgence that was made by the appellant.

[78] It is important to keep in mind that the appellant was a senior employee of the bank and the issue of pecuniary embarrassment becomes magnified when a judgment in default is taken against such a person. Here, the appellant had implored Fuji Xerox (as the judgment creditor) for indulgence. In our view, the JID against the appellant coupled with her plea to Fuji Xerox for indulgence culminating in the settlement agreement, are matters which would adversely impact the reputation and image of the bank.

[79] It is unthinkable that a senior employee of the bank could find herself in a financial predicament in which a judgment in default was taken against her and all the while, the bank was unaware of the said employee's involvement in outside business and the liabilities that accrued as a result of such involvement.

[80] The Industrial Court relied on the principle enunciated in *Malayan Banking Bhd, Seremban v. Kesatuan Kebangsaan Pekerja-pekerja Bank* [1996] 2 ILR 144 ("*MBB* case"), that pecuniary embarrassment of a bank employee is prejudicial to the interest, if not the reputation, of the bank. Of course, the facts of the *MBB* case were different.

[81] The dispute emanated from the decision of a bank to impose a stoppage to the employee's annual increments for three years as a punishment. The alleged misconduct of the employee was the recurrent pecuniary embarrassment after having been warned by the bank not to have any further creditor's claims against him.

[82] Nonetheless, the employee subsequently had two further claims made against him. Earlier, the bank had issued its employee with a letter whereby he was required to settle all debts and was further warned that, in the event, further claims were made against him, the bank would take stern disciplinary action against him. However, two months after the warning, the bank received notification that the employee had failed to settle debts from separate debtors. In both cases, the bank wrote to the employee asking him to explain his position.

[83] In the *MBB* case, the employee admitted that he had many debts and promised to negotiate an amicable settlement with his creditors. During its deliberations, the Industrial Court observed that, although there was proximity of time, the staff committee had preferred two separate charges and imposed stoppage of increment for one year and two years respectively. Thus, the employee had his increment stopped for three years.

[84] As stated earlier, the facts in the *MBB* case which gave rise to pecuniary embarrassment are different. The facts may vary from case to case. However, the principle is important and it is encapsulated in the following paragraph of the decision of the Industrial Court in the *MBB* case which read as:

> The Court has no problem in accepting the bank's contention that for a bank employee to be in a position of pecuniary embarrassment is a misconduct. It agrees that the **categories of misconduct are not closed.** (emphasis added)

[85] The Industrial Court in the *MBB* case also referred to the principle established by the case of *Pearce v. Foster* [1886] (17) QBD 536 (CA) (per Lopes LJ) as being part of our laws, namely:

> If a servant conducts himself in a way **inconsistent with the faithful discharge of his duty in the service,** it is misconduct which justifies immediate dismissal. That misconduct, according to my view need not be misconduct into the carrying on of the service or the business. **It is sufficient if it is conduct which is prejudicial or is likely to be prejudicial to the interests or to the reputation of the master,** and the master will be justified, not only if he discovers it at the time, but also if he discovers it afterwards, in dismissing that servant. (emphasis added)

[86] The Industrial Court then enunciated that:

> It is this Court's view that the conduct of the employee as a bank employee in getting into a situation of pecuniary embarrassment is conduct which is prejudicial or is likely to be prejudicial to the interest if not the reputation of the bank.

[87] But the appellant argues that it is pecuniary embarrassment only if she is in a situation of not being able to pay the debt, which is apparently not the case here. The passage which the appellant seems to be relying upon is, "The court agrees borrowing money is not a misconduct. It is misconduct only if an employee borrows beyond his capacity to repay and lands himself in a position of pecuniary embarrassment."

[88] We do not agree with the appellant's contention that there is no pecuniary embarrassment merely because she is a high-income earner. There is no presumption that a high-income earner is free from financial impecuniosity. Indeed, the appellant's email to the solicitors for Fuji Xerox reveals that she was seeking indulgence as she was the sole breadwinner in the family. Obviously, what the appellant was portraying to Fuji Xerox was that she was not able to pay more than what she had proposed in her email. The *MBB* case itself recognises that the categories of pecuniary embarrassment are never closed.

[89] In our view, pecuniary embarrassment is established by the fact that:

(i) the appellant was a senior employee of the bank;

(ii) JID for RM160,485.77 was entered against, *inter alia*, the appellant;

(iii) the appellant had to plead with Fuji Xerox for indulgence and accommodation; and

(iv) there was eventually a settlement agreement whereby Fuji Xerox agreed to reduce the amount payable to RM120,000 and for the appellant to pay RM2,000 per month.

[90] The entire issue involving RSA, the appellant and Fuji Xerox, in our view, demonstrates that restrictions against a bank's staff being involved in outside business were necessary and imperative. As the facts of the present case have shown how the appellant's lack of disclosure has resulted in the bank being unaware that one of its senior employee (who was an "enforcer" of the code), was in breach of the code. But for the settlement agreement, Fuji Xerox could have levied execution upon the appellant.

[91] It is apposite here to observe that banks, as part of the financial industry, are highly regulated (see Financial Services Act 2013 (Act 758)). It is so, for very obvious and incontrovertible reasons. Within the core for the need to regulate financial institutions such as banks, is the indispensable necessity for uncompromising integrity.

[92] Consonant with this essential ingredient of integrity is a requirement not only for integrity in the system in which financial institutions operate but also in the personnel who man the system. The appellant is one such personnel. Vested with responsibilities and duties, the appellant was in a position within the financial industry that could not afford to brook any shortcoming in integrity.

[93] Having due regard to all these matters, it is plain that the appellant's application for judicial review was essentially a challenge to findings of fact and conclusions that were made by the Industrial Court. Such findings are generally not reviewable by way of judicial review proceedings. It is settled law that it is not the function of the court to act as an appellate court or to use the judicial review proceedings as a cloak for, or to disguise, what is in essence an appeal. Thus, her dismissal was not disproportionate or unreasonably severe having regard to the gravity of the charges of misconduct that were levelled against her and which were proven.

[94] The principles of judicial review were lucidly stated by the Court of Appeal (per Mohd Ghazali Yusoff JCA, as he then was) in *Menara Panglobal Sdn Bhd v. Arokianathan Sivapiragasam* [2006] 2 CLJ 501, [2006] 3 MLJ 493, [2006] MLJU 131, [2006] 3 AMR 555 (CA) at para. [42]:

(i) judicial review is not an appeal from a decision but a review of the manner in which the decision was made;

(ii) the High Court is not entitled on an application for judicial review to consider whether the decision itself, on the merits of the facts, was fair and reasonable;

(iii) the High Court, through judicial review, should not introduce technicalities of the court of law to the Industrial Court; this would certainly be so as s. 30(5) of the Industrial Relations Act 1967 imposes a duty upon the Industrial Court to have regard to substantial merits of a case rather than to technicalities and it also requires the Industrial Court to decide a case in accordance with equity and good conscience;

(iv) the main and only function of the Industrial Court in dealing with a reference under s. 20 of the Industrial Relations Act 1967 is to determine whether the misconduct or irregularities complained of by the management as to the grounds of dismissal were in fact committed by the workman and if so, whether such grounds constitute just cause or excuse for the dismissal;

(v) the Industrial Court should not be burdened with the technicalities regarding standard of proof, the rules of evidence and procedure that are applied in the court of law; and

(vi) the High Court will not interfere with finding of facts by the Industrial Court unless the same are completely unsupported by evidence and further, will not interfere merely because it may come to different conclusions on facts on the basis of the same evidence; weighing and assessing the evidence of the witnesses is the function of the Industrial Court and not that of the High Court.

Result

[95] Having due regard to trite principles relating to the jurisdiction of the High Court in a judicial review, particularly in respect of Industrial Court awards, we find no error or misdirection in the reasoning or conclusions of the Industrial Court.

[96] The Industrial Court had conducted a detailed review of all facts and evidence, both oral and documentary and had drawn inferences from the evidence of the appellant and that of the bank (COW1 and COW2). The Industrial Court found that the charges of misconduct had been proven and that although the bank did not conduct a domestic inquiry, it was not fatal. This was because following the principle that was enunciated by the Supreme Court in *Dreamland Corp (M) Sdn Bhd v. Choong Chin Sooi & Industrial Court Of Malaysia* [1988] 1 CLJ 1; [1988] 1 CLJ (Rep) 39; [1988] 1 MLJ 111 (SC) (at pp. 115 to 116), the employer (the bank) could justify the dismissal by proving alleged misconduct *de novo* before the Industrial Court. Here, the bank succeeded in proving the four charges of misconduct by presenting the requisite evidence before the Industrial Court.

[97] We agree with the High Court in that the Industrial Court's findings ought not to be disturbed unless it could be shown that the award is tainted with errors of law – suffers from illegality, procedural impropriety or that it was so plainly irrational.

[98] We have looked at the matter in totality and did not detect any illegality in the finding of the Industrial Court per the award or any taint of procedural impropriety or irrationality.

[99] In our view, the High Court had comprehensively examined the facts and documents including the analysis and reasons contained in the award and had found (correctly in our view) that there were no errors of law committed by the Industrial Court.

[100] In the circumstances, we find no merit in the appeal. The appeal is dismissed with costs of RM10,000.